COMMANDER'S DIGEST

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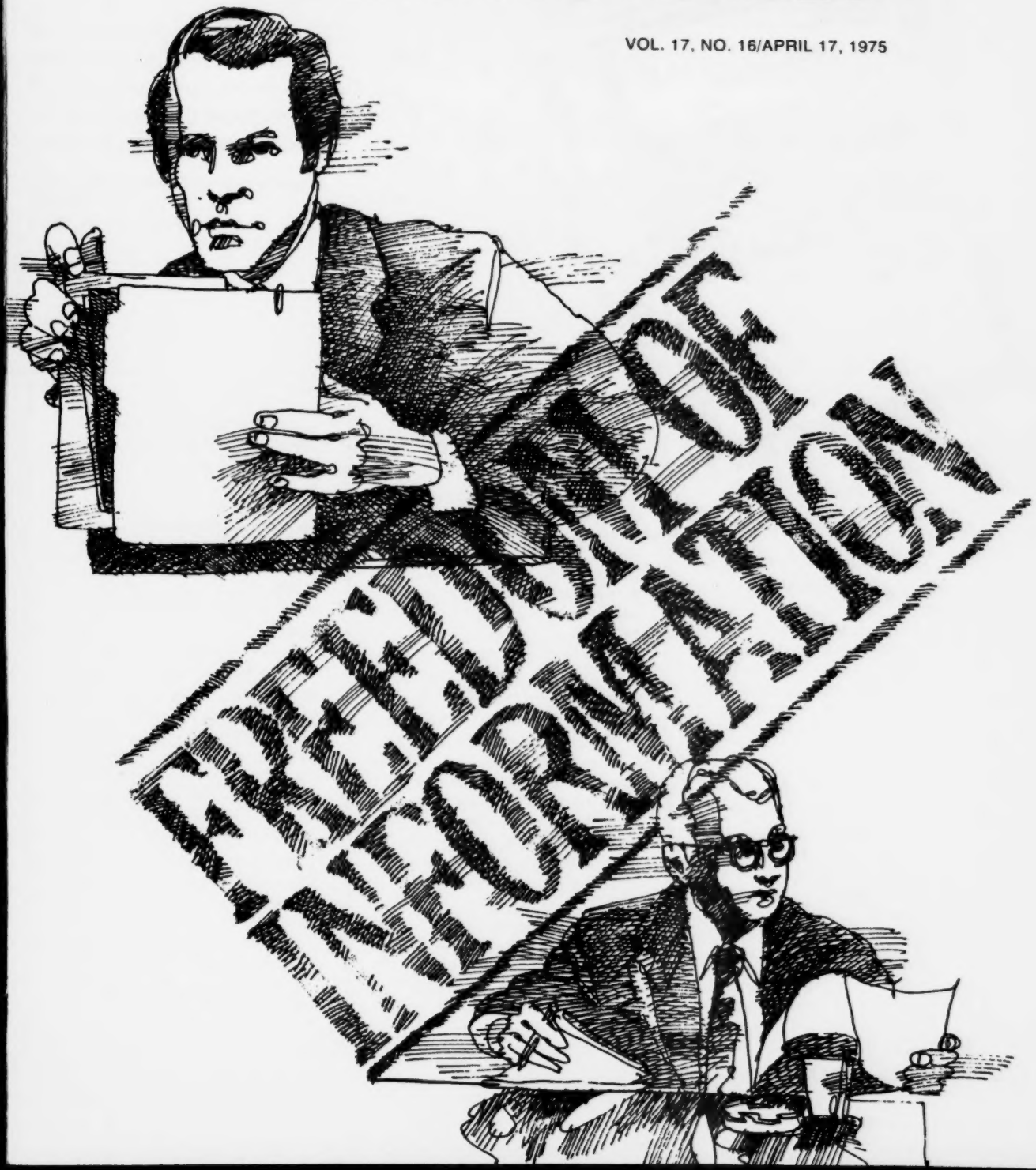
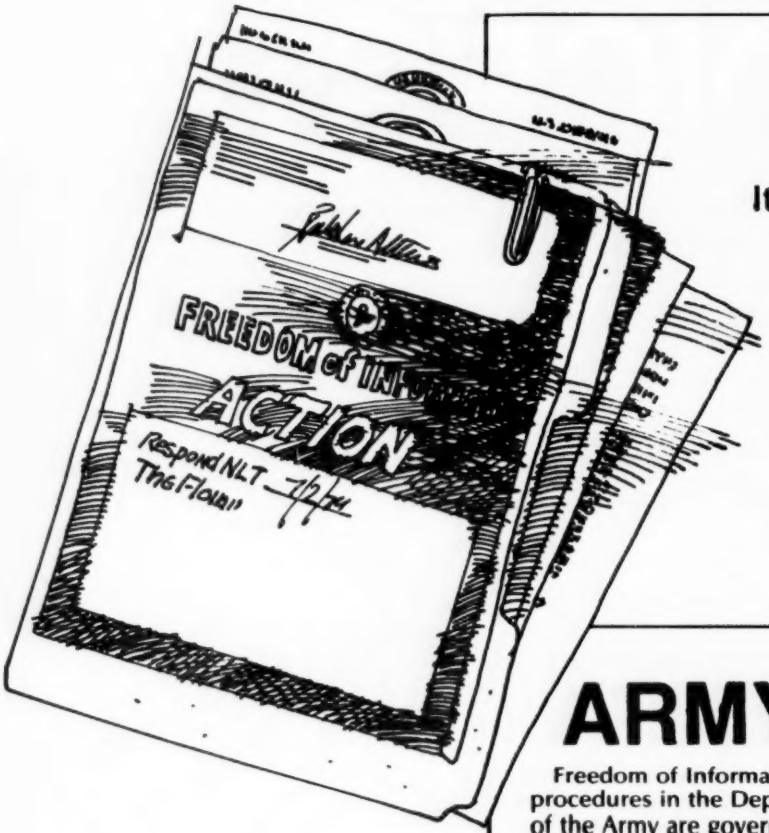




It is the policy of the Department of Defense to make available to the public the maximum amount of information concerning its operations and activities.

Department of Defense Directive 5400.7
February 14, 1975

ARMY

Freedom of Information procedures in the Department of the Army are governed by AR 340-17, "Release of Information and Records from Army Files." Change 1 of this regulation, dated January 24, 1975, incorporates requirements to meet the new provisions of the Freedom of Information (FOI) law that became effective February 19, 1975.

Army policy requires prompt, maximum release of Army records, including access to and copies of identifiable records unless exempted by 5 USC 552 — the Freedom of Information Act.

The main change in the regulation involves an extensive rewrite of Chapter 2, "Release of Records (5 USC 522)." The rewritten Army regulation also includes appendices listing revised fees to meet the expense of complying with public requests for copies of documents, governing preservation of personal privacy for Army members, and a functional listing of officials to whom information requests may be directed.

Essentially, the Army is making full use of its traditional staffing and branch specialties, such as finance, legal, intelligence, military personnel, civilian personnel, etc. These routes of public access to Army records are effective at installation level as well as at the Pentagon.

The Adjutant General of the Army has an important role in making Army records available to the public as he is the custodian of the largest portion of the Army's files.

Concurrently, the Army

How the Armed Services Have Implemented The New Freedom Of Information Act

Chief of Information and information officers of the Army's headquarters and troop commands worldwide are directly concerned with the implementation of the act as it impacts on public affairs matters.

While the Personal Privacy Act of 1974 and the new changes to the Freedom of Information Act are not in conflict, an appendix to the Army regulation excludes release of such information as medical records, test scores and personnel actions. The appendix anticipates, however, that Army members may wish to voluntarily waive these provisions — for example to obtain credit or enter school. Accordingly this waiver option is available with the written consent of the individual concerned.

In the appendix on fees, revised charges are pegged at a minimum of $2 per request for publications in stock, $5 minimum for reproductions when shelf stock is not available, and $3.50 for clerical search and $10 for professional search. Depending upon the volume of material requested, costs of fulfilling a Freedom of Information request could well be higher.

Requests

Army's new regulation states that all Freedom of Information requests must be made in writing and state expressly or implicitly that the request is made under the FOI law. The request must reasonably describe the records sought. The requestor must also pay or agree to pay, in advance, all fees assessed in processing his request. If the cost is less than $10 the Army will begin work immediately toward fulfilling the request.

There is no obligation on the part of the Army to create a record, however, merely to satisfy a request.

Officials handling FOI actions must also make certain that the requests do not impinge on other Army regulations or statutes governing release of information. Eighteen separate AR's are mentioned in the regulation. Some common references are: Safeguarding "For Official Use Only" Information — AR 340-16; Military Personnel Records — AR 640-10; National Security Classified Information — AR 380-5 and DoD Dir. 5200.1; Litigation, Release of Information and Appearances of Witnesses — AR 27-40; Medical Records and Files in Record Centers — AR 340-1.

Action On Requests

Assuming that a request meets the criteria for release, a requestor must be notified

within 10 days that his request is being honored. This does not necessarily imply that the requested record will actually be provided within 10 days, but that it will be dispatched with the least practical delay.

Denial of a request is quite another matter. The addressee must determine if any of the nine exemptions of the FOI Act apply. If so, he must notify the Initial Denial Authority (IDA) by the most rapid means available. At the same time, the recipient of the request is required by Army rules to notify the requestor within five days that the matter has been referred to the IDA for determination of releasability. The IDA must take action within the overall 10 days permitted for the initial determination. The requestor is given the IDA's name and address and informed that he may communicate directly concerning the status of his request.

IDA Responsibilities

IDA is plural — 12 in all — rather than a single authority. Yet the first name on the list (The Adjutant General, ATTN: AG-AMR-S, Forrestal Bldg., Washington, DC. 20314) serves as a single point of contact. The AG forwards information requests not in his purview to the appropriate IDA in the Army headquarters.

The Army Adjutant General has some important IDA functions in his own right, including handling all requests for medical and personnel records of former military personnel, and requests for documents which are classified in whole or in part.

The Commander, United States Army Military Personnel Center handles requests pertaining to active duty personnel.

The Army's Surgeon General handles FOI requests pertaining to medical records of active duty personnel and their dependents.

The Deputy Chief of Staff for Personnel handles requests for civilian personnel records, on behavioral science matters, and military police reports except DA Forms 3975 (Military Police Report) and 3946 (Military Police Traffic Accident Investigation Report).

The Inspector General and Auditor General handles FOI requests pertaining to IG reports, aircraft safety investigations and audits, and reports prepared by the Audit Agency.

The Chief of Chaplains acts on matters involving ecclesiastical rites and privileged communications related to the clergy.

The Chief of Engineers acts on matters pertaining to military construction, engineering procurement, ecology and civil works under his purview.

The Commander, United States Army Intelligence Agency is authorized to act on all requests involving U.S. Army intelligence investigative files.

The Comptroller of the Army is responsible for replies to requests pertaining to finance and accounting records.

The Commander, United States Army Material Command acts on all requests involving procurement records within AMC.

The Army's Judge Advocate General handles all other requests including DA Forms 3975 and 3946. Additionally, he acts on matters for all IDA's in cases which involve litigation in which the United States has an interest.

Exemptions

The new regulation squarely places authority for the denial of requests for records upon the IDA and the Secretary of the Army. No other official may make such determinations.

Practically speaking, the IDA's first responsibility to all referrals of requests for exempted records is to determine whether or not the request should be granted or if a worthwhile purpose would be served by withholding the information. Even though a FOI Act exemption may apply only to part of a record, the IDA is required to determine further whether reasonably segregable portions of it are releasable to the requestor.

If the determination for release is favorable, the IDA completes administrative details within the 10 working days stipulated by the law, notifying the requestor that the record or segregable portions will be provided, and directing the custodian to make the appropriate release.

If the determination is for denial, the IDA must initiate a series of actions. He must advise the requestor, in writing and within 10 working days, as to the reason for the denial, citing the specific exemption authority of the Freedom of Information Act, 5 USC 552(b) and the name and

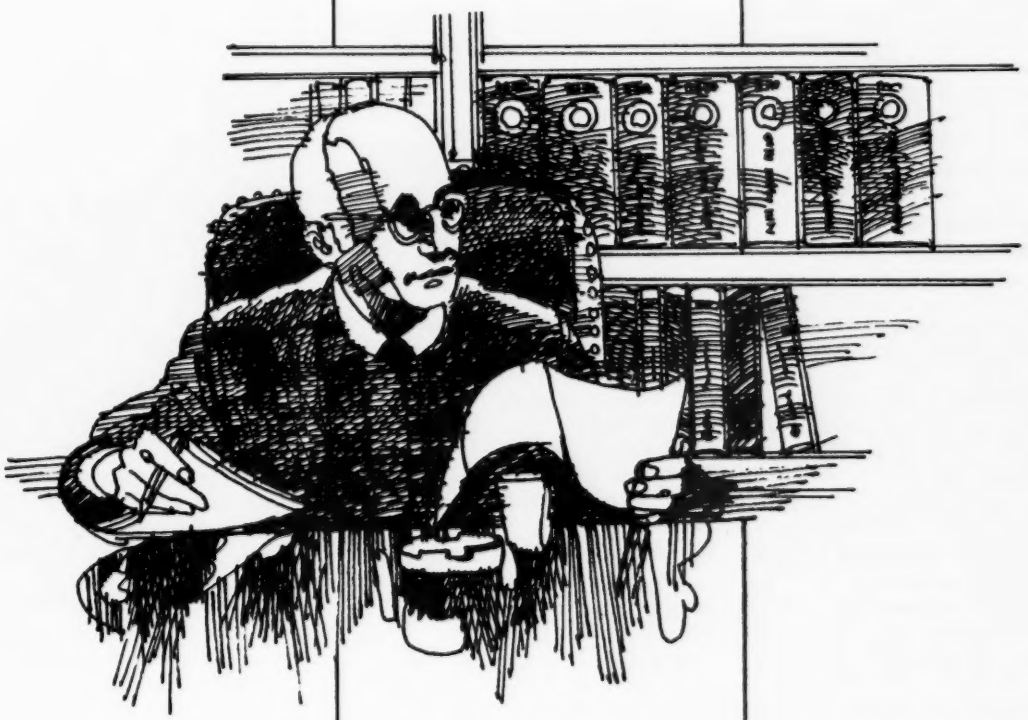
title of the denial authority, and he must inform the requestor of the right of appeal to the Secretary of the Army (ATTN: Army General Counsel).

The IDA also forwards advance information copies of his denial correspondence to the Office of the Secretary of the Army and must be prepared to provide the Army General Counsel with all pertinent material concerning the denial or partial denial within 48 hours.

Time Problem

As a practical matter, any IDA will be dealing with referrals from the field by telephone or by TWX to save time because of the short-fused 10-day deadline for response to requests. It is his responsibility to get the proper details, to insure that the documents are being forwarded with dispatch, and to see that the action officer in the field is giving the matter highest priority.

When the IDA sees that he will need a time extension to make the initial decision, he will telephone this requirement to the requestor. He must explain why the request cannot be handled within the allotted time — i.e. the need to research voluminous files, because records are located in widely dispersed offices, or because of the need for consultation with another agency — and the requestor must be informed that he is not obligated to agree to the extension, that he can treat it



as an initial denial and institute an appeal action to the Secretary of the Army. In any case, an extension cannot exceed 10 days from the time an IDA requests it and only one 10-day extension can be obtained throughout the processing of an FOI request. Agreement to an extension does not prejudice the requestor's right to appeal an initial denial.

Denials

When denial is based on security requirements of national defense or foreign policy (the first of nine exemptions authorized in the FOI Act), the IDA's letter of denial must cite the specific provisions of Executive Order 11652 and DoD Directive 5200.1-R. For the other eight exemptions under the law, see *Commanders Digest*, February 18, 1975, p. 4. Change 1 to AR 340-17 takes up these exemptions at some length.

It is important to note that some information exempted from the general public may be releaseable to a specific person, for example: condition of a hospital patient, exempt from release to the general public, but releaseable to his nearest relative. Another example of generally exempted information, but releasable to a specified family member would be data relating to insurance and allotment beneficiaries or pay and allowance entitlements. A legal representative of the next of kin also would be entitled to receive such normally exempted material to settle the estate of a deceased person.

Legal Disputes

When there is a request for a record relating to pending litigation involving the United States, it is immediately forwarded to Army's Judge Advocate General (HQ DAJA-LT), Washington, D.C. 20310, with concurrent notice by telephone, (Autovon 225-1644 or Area Code 202 695-1644).

If the request involves litigation in which the United States is not concerned, the local staff judge advocate or legal officer can handle the response if the request is releasable, or through coordination with the Judge Advocate General (address as above).

Requests concerning administrative tort claims against the Army must be transmitted without delay to the Chief, U.S. Army Claims Service, Fort George G. Meade, MD. 20755. (Autovon 923-7860 or Area Code 301 677-7860.)

In cases of requests involving contract disputes, immediate notification is made to the Judge Advocate General, ATTN: JAAJ-CAD, Nassif Bldg., 5611 Columbia Pike, Falls Church, VA. 22041. (Autovon 289-2460 or Area Code 202 756-2460.)

Reporting Requirements

An annual reporting requirement on or before March 1 each year as stipulated by the amended law (applicable to all Military Departments, DoD, and all other Federal agencies) rests in the Army with the Adjutant General. The report is prepared in TAG and forwarded through the Army Chief of Staff, with information copies to the Army General Counsel and Chief of Public Information. Feeder reports from the 11 other IDAs must be in the TAG's office (ATTN: DAAG-AMR) by no later than January 10.

MARINE CORPS

The Freedom of Information (FOI) Act is governed in the Marines by Headquarters Marine Corps Bulletin 5720 and Marine Corps Bulletin 5720 of February 19, 1975.

Essentially, the Marines are handling new procedures within the existing chain of command. Certain officers at Headquarters, 14 commanding generals in the field and directors of Marine Corps Districts will handle both disclosure and denial actions. When a denial occurs, a review will be automatically initiated at Headquarters, Marine Corps.

The above officers (designated addressees) possess the full range of authority and responsibility that goes with initial determination. Specifically they are:

- Authorized to grant or deny requests;
- Authorized to delegate authority to

grant requests for records from the public;

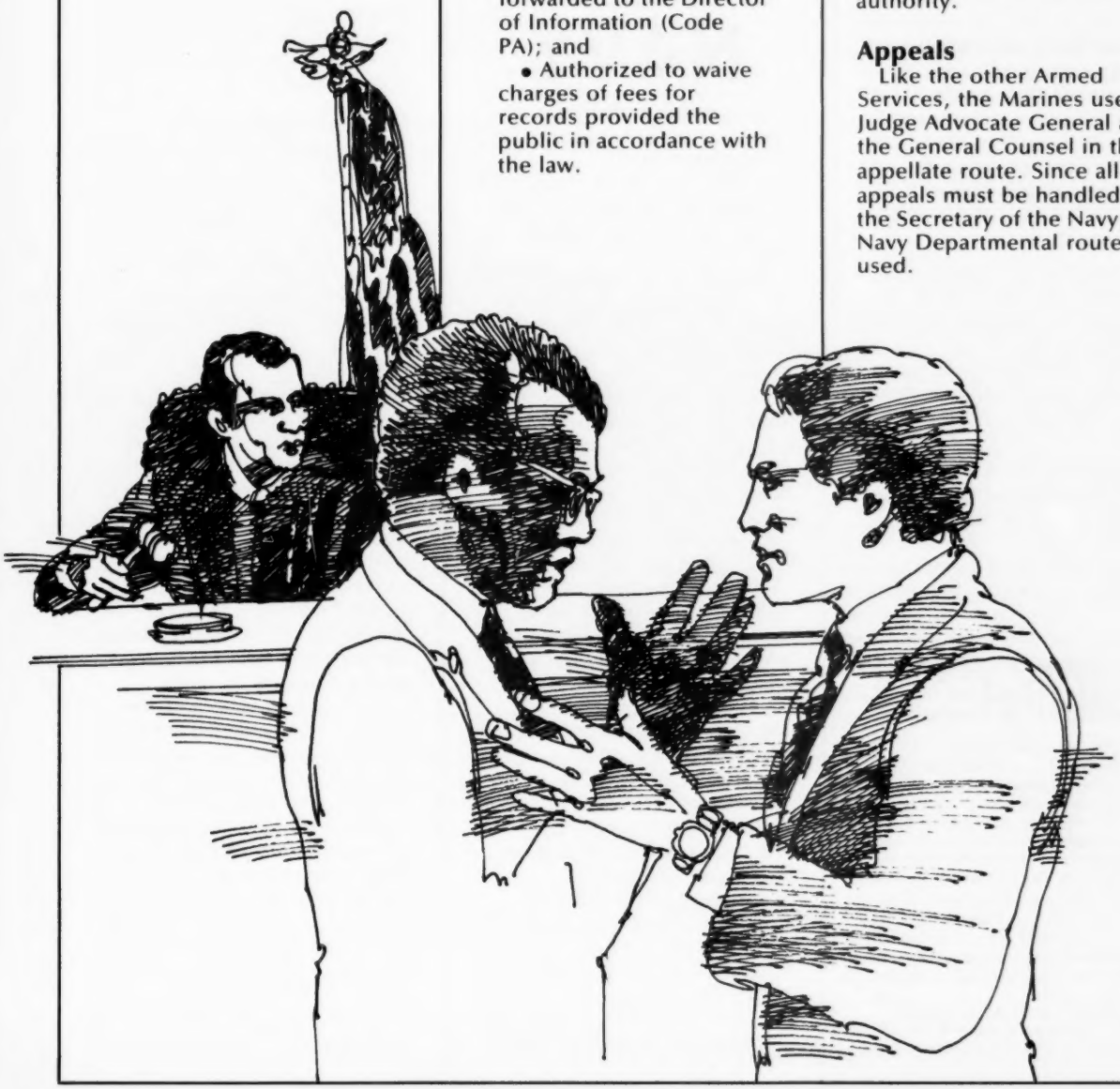
- Authorized to invoke the 10-day extension of time for unusual circumstances;
- Responsible for the determination of the "effective date of receipt";
- Responsible for interagency and intraagency forwarding of requests;
- Responsible for ensuring that all cases of denial are expeditiously forwarded to the Director of Information (Code PA); and
- Authorized to waive charges of fees for records provided the public in accordance with the law.

Denials

The law is the law; the same for one Service as the others; and denials by the Marine Corps must cite the specific reason for denial, the right of the requester to appeal to the Secretary of the Navy, and the name and title of the denial authority.

Appeals

Like the other Armed Services, the Marines use the Judge Advocate General and the General Counsel in the appellate route. Since all appeals must be handled by the Secretary of the Navy, the Navy Departmental route is used.



Appeals may be addressed one of two ways:

The Judge Advocate
General (Code 14L)
Department of the Navy
Washington, D.C. 20370

or

The General Counsel
Department of the Navy
Washington, D.C. 20360

Public Responsibilities

Only written requests for preexisting identifiable records will be considered to fully qualify as "Freedom of Information Act" requests, requiring compliance with HQBul 5720 and MCBul 5720 of February 19, 1975.

Hopefully, the public will mark their requests "FOI" and are encouraged to do so to expedite handling; however, the requester is not required to specify that the request is pursuant to the FOIA.

Therefore, all communications to the Marine Corps or to any officer, organization, or agency—written, oral or telephonic—will be responded to according to the principles embodied in the FOI whenever possible. Moreover, the Marine Corps Bulletin stipulates that a liberal standard must be applied to the initial determination as to whether a request meets the standards of the FOI.

COMMANDERS DIGEST

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NAVY

To comply with the newly-amended Freedom of Information Act (FOI), the Navy has issued SECNAVINST 5720.42B stating procedures to be followed to implement the act.

This SECNAV instruction, to be published in the *Federal Register* for guidance to the public, governs responses of Navy officials and military and civilian personnel to written requests for permission to examine or to be provided with copies of Department of Navy records.

Informal requests and requests for information other than records are not subject to the technical requirements of the new instruction but shall be answered promptly in the usual manner.

Like other Service regulations, this instruction outlines policy, defines records, lists exemptions of records not to be made available, and gives instructions for publication, indexing, and public inspection of records. It contains, of course, detailed procedures and full appendices and appropriate forms of guidelines.

SECNAVINST 5720.42B, now enroute or at all ships and stations, even contains a summary of the amended Freedom of Information Act.

Essentially, the Navy separates the responsibility and authority for determination into (1) "release authorities" — commanding officers, and (2) "denial authorities" — high topside officials in the Navy Department, the Fleets, the System Commands, and the Naval Districts.

Release Authorities

Commanding officers and heads of all Navy and Marine Corps activities (departmental and field) are authorized to furnish copies of certain records in their custody or to make such records available for examination upon proper request.

Denial Authorities

At Department of Navy level, denial authorities are the Secretary of the Navy's civilian executive assistants, the Chief of Naval Operations, the Commandant of the Marine Corps, the Chief of Naval Material, the Chief of Naval Personnel, the Chief of the Bureau of Medicine and Surgery, the Auditor General of the Navy, the Naval Inspector General, and the heads of Navy Department offices and boards. The Judge Advocate General and his deputy, and the General Counsel and his deputies are excluded from this grant of authorization, but the Assistant Judge Advocate General, the assistants to the General Counsel, and Director, Contract Appeals Division, Office of the General Counsel, are so authorized.

For shore activities, commanders of naval systems commands, commandants of naval districts, the commanders of Naval Intelligence, Naval Security Group, Naval Telecommunications, Naval Weather Service, the Chief of Naval Education and Training, the Chief of Naval Reserves, and the Oceanographer of the Navy are denial authorities.

Denial authorities for operating forces are fleet commanders in chief, and the Commander, Military Sealift Command.

Denial authority may also be delegated by the Chief of Naval Operations or the Commandant of the Marine Corps to commanders of major Navy and Marine Corps activities.

Denial Actions

Denial authorities possess, of course, the power to release information as well as to deny it, and release at this high level is governed by the same procedures and policies as it is at lower levels. This includes allowing inspection of a document as well as providing a copy of the record requested.

But denial authorities will be most often concerned with partial or full denials. It is they who notify the requestor within 10 working days of the denial, the reason for it, and the name and position of the person making the denial, plus the requestor's right to appeal to the Secretary of the Navy. At this stage, they may obtain an additional 10 working day extension in certain cases if the information requested is in several locations, if there is a large volume of records to be searched, or if coordination with other agencies is required.

Appeals

Assuming the requestor who was denied information takes up the invitation to appeal the original decision, there is yet another topside effort within a 20 working-day time frame.

Appeals are addressed to the Secretary of the Navy. The Judge Advocate General handles all appellate matters except the business and commercial law aspects assigned to the General Counsel.

Should the decision remain adverse after appeal, this appellate authority must again notify the requestor of the turndown, the reasons why, the authority by name and title, and his right under the law to appeal this adverse decision to a Federal Court.

In cases of initial denial the Navy is encouraging denial authorities to consult with other officials. The Judge Advocate General and the General Counsel are the two offices specifically mentioned by the new instruction. The Information Officer is also specified, particularly in instances which have a direct news media interest.

Releases

The problem facing the Navy here — a similar one facing all Services — is not so much disclosing releaseable information as it is processing the requests. For one thing, the requestor must reasonably know what he is after and identify it. He should make this request in writing and specify he is requesting under provisions of the Freedom of Information Act. He should also indicate a willingness to pay search and copy costs.

The bind usually comes in the public's not meeting these minimum requirements — for example, inadequately describing the document so that a search is hopeless or neglecting to make arrangement for the fee. Release authorities do have, incidentally, the option of releasing the information without a fee if they determine it would be in the best interests of their installation to do so.

Yet another problem addressed is that the public honestly doesn't know where to request the information. The new SECNAVINST seeks to alleviate the problem by publishing an 11-page compilation of types of records sought and the address of the document keeper.

Reporting Requirements

The Chief of Naval Operations (OP-09B16) is responsible for preparing the consolidated Department of the Navy annual report of denial actions taken and the dispositions of the cases and presenting it to the Secretary of Defense by January 30. These reporting requirements are stipulated by the new law listed in full in the February 18 issue of *Commanders Digest*.

The CNO will require, of course, earlier input (by January 10) from the various denial authorities.

In addition, the Director, Office of Civilian Manpower Management will report any

disciplinary actions taken against civilian personnel for "arbitrary and capricious" withholding of records.

The Judge Advocate General will submit status reports, including fees awarded against the United States, in court cases.

And the Comptroller of the Navy will provide the amount of fees collected under the Freedom of Information Act.

AIR FORCE

On February 19, 1975, the United States Air Force published a revised AFR 12-30, "Disclosure of Air Force Records to the Public," implementing the Freedom of Information (FOI) Act as revised.

The Administrative Assistant to the Secretary of the Air Force (SAF/AA) has the overall Air Force responsibility for compliance, and makes the final decisions on appeals.

The Director of Administration, Headquarters, United States Air Force, supervises the administration of the act, and submits the annual report to Congress. He also develops an Air Force program of instruction on how the act is carried out.

Commanders of major commands and separate operating agencies are responsible for the implementation of the program in their commands and agencies.

Throughout the Air Force, the actual responses to requests for information are the responsibility of the documentation management staff.

Air Force policy will be to make the maximum amount of information and records available to the public.

Under the act, a record must not be withheld because of the possibility that its release might suggest administrative error or inefficiency, or might embarrass the Air Force or an Air Force official.

Under the new AFR 12-30, a request should not be denied solely because the record is maintained in a computer. However, the Air Force is under no obligation to create a record to satisfy a request for information. The requester must be reasonably

Table 1. Special Release Procedures for Certain Types of Records.

Type of Specialized Request	*Governing Directive*
Accident/Incident Investigation and Reports	AFR 127-4
Background, Criminal, and Counterintelligence Reports of Investigation	AFR 124-4
Civilian Personnel Records	Federal Personnel Manual, Chap 294, and AF Supplement to it
Classified Records	DOD ISPR 5200.1R/AFR 205-1
Collateral Investigations of Aircraft and Missile Accidents	AFR 110-14
Computer System Description, Programs, and Related Documentation	AFM 171-9
Drug/Alcohol Abuse Programs Documentation	AFR 30-2
Inspection Reports	AFR 123-1
Inspector General Investigation	AFR 120-3
Litigation	AFR 110-5
Medical Records	AFR 168-4
Military Personnel Records	AFR 31-6
News Media	AFR 190-12
Procurement Information Reports	Armed Services Procurement Regulations (ASPRs)
Release of Test Results on Commercial Equipment	AFR 80-24
Unclassified Records of Trials After Courts-martial	AFM 111-1

Table 2. Disclosure Authority for Specialized Requests.

Specialized Type of Record	*Who Is the Disclosure Authority*
1. For use in litigation	The Judge Advocate General, or other authority listed in AFR 110-5
2. Records of trial after courts-martial	The Judge Advocate General, or other authority listed in AFR 111-2
3. Medical Records	The director, base medical services, or a designated medical officer, subject to the requirements of AFM 168-4
4. Inspector General Report of Investigation	As outlined in AFR 120-3
5. Inspection Reports	As outlined in AFR 123-1
6. Primary accident/incident investigations (excludes ground/explosive accidents)	As outlined in AFR 127-4
7. Collateral accident/incident investigations	As outlined in AFR 110-14
8. AF Office of Special Investigation reports of investigation	As outlined in AFR 124-4
9. Classified Records	The original classifier or the office currently responsible for the classification of the subject matter pursuant to DOD ISPR 5200.1R

specific in identifying each record desired.

DAD Responsibilities

The Documentation Management Office (DAD) must monitor the responses to requests to make sure that they comply with the new 10-work day limit (Saturdays, Sundays, legal holidays not counted). If the Air Force fails to make a determination within that time limit, the requester may seek immediate judicial action. (The request is not considered officially "received" until it is received by the proper DAD office.)

The regulation designates certain denial authorities who have authority to deny requests for information in nine specific categories that are exempt from the act.

When the requests are for certain specialized types of information, their release is governed by other Air Force regulations. For example, they may be any one of nine different categories of information — ranging from accident investigation to personnel records to procurement reports. The official who has authority to disclose such information is identified in the directives listed in table above.

There are also special release procedures for certain other records. These procedures are contained in the directives listed in the table on page 10.

Air Force denial authorities can deny information under nine specific exemptions. These are essentially exemptions on the basis of national security, privileged commercial data, and personal privacy (see complete list in *Commanders Digest,* February 18, 1975.)

Only these top AF officials (or their designees) are authorized to deny requests for records: deputy chiefs of staff and chiefs of comparable or higher level at Headquarters, USAF; and commanders of major commands, or of separate operating agencies.

These officials are enjoined to consult with the staff judge advocate before they make any decision to deny, or partially deny, a request for disclosure of records.

If the decision is adverse, the denial authorities must follow a certain prescribed procedure. They must give the requester a written notification stating the reasons for denial, the name and title of the person making the denial, and inform the requester of the right to appeal the decision to the Secretary of the Air Force, and receive yet another ruling within 20 work days.

In unusual circumstances, for example, when the requester asks for voluminous information or for records located at two or more locations, or when the decision to release involves consultation with other agencies, officials may request a 10-day extension of the time limit.

Favorable Decisions

When an FOI request is decided favorably, the DAD must process the request accordingly. If the request is routine, DAD can answer it simply by filling it, but if the request carries a postmark more than 10 workdays old, it must be acknowledged.

DAD should notify the information office if release of records is newsworthy.

A large part of the FOI program involves the release of information, not denial. For this reason, documentation management officers and officials at all levels of the Air Force are designated Freedom of Information managers. It is this manager who has the overall responsibility for processing all requests for records. He must designate an office to process FOI requests at his level. This processing generally includes such functions as: fixing the 10-day working deadlines and otherwise processing the request; collecting fees and charges; making available to the public a master publication library; serving as coordination point within the Air Force; functioning as liaison in FOI matters relating to other Services and the Federal government.

"Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."

— President James Madison

Partial Denials

When the request cannot be wholly approved or denied (that is, part of the information can be release and part of it cannot), the Air Force uses a combination of the denial procedure and the release procedure.

Under the law, information may be released in any reasonably segregable portion. This is, if any part of any request is to be deleted, the request must be considered a denial and handled as such. Each deletion must be fully justified in writing.

After the deletions are made, the document can then be handled under the disclosure procedure.

Expediting

In order to give highest priority at each level to handling these requests, the functional address indicator "DADF" is to be used on all correspondence to identify it as a FOI request. AFR 12-30 tells the public to use this functional address indicator (DADF) on all requests, to expedite the process.

Air Force personnel must make every reasonable effort to assist requestors in directing requests for records to the proper authorities. AFR 12-30 contains these handy functional guides.

Public Responsibilities

The public is instructed to make these requests in writing, and to identify the information as completely as possible, including the title, description, number, date, and issuing authority, if known. If the request involves information about military or civilian personnel, it must identify the person's first name, middle initial and surname, date and place of birth, and social security number (if known). In addition, the requestor must specify whether he wishes to inspect the record or to obtain a copy of it.

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